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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LYNWOOD INVESTMENTS CY LIMITED,

Plaintiff,

v.

MAXIM KONOVALOV, IGOR SYSOEV, ANDREY ALEXEEV, MAXIM DOUNIN, GLEB SMIRNOFF, ANGUS ROBERTSON, NGINX, INC. (BVI), NGINX SOFTWARE, INC., NGINX, INC. (DE), BV NGINX, LLC, RUNA CAPITAL, INC., EVENTURE CAPITAL PARTNERS II LLC and F5 NETWORKS, INC.,

Defendants.

Case No. 5:20-cv-03778-LHK

DEFENDANTS MAXIM KONOVALOV, IGOR SYSOEV, ANDREY ALEXEEV, MAXIM DOUNIN, GLEB SMIRNOFF, ANGUS ROBERTSON'S REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

Date: February 18, 2021
Time: 1:30 p.m.
Courtroom 8, 4th Floor
The Honorable Lucy H. Koh

COMPLAINT FILED: June 8, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Lynwood's rambling complaint asserts against six individuals (collectively, the "Individuals") sixteen claims that are time-barred and fail to state a claim.

Lynwood admits that Sysoev developed the open source NGINX software beginning in the early 2000s, *see* Compl. ¶ 215, and alleges that Sysoev and Konovalov notified Rambler in 2011 of their intention "to form a new company that would provide [NGINX] support services." *See id.* ¶¶ 281, 283. Lynwood further admits that Rambler assigned its purported rights to Lynwood in 2015 in advance of a potential dispute. *See id.* ¶ 471. Lynwood was on notice of its claims by January 2015 at the latest. Its conclusory recitation of tolling doctrines does not save its case.

Lynwood attacks the Individuals' experienced and widely respected Russian law expert, Alexander Muranov. Muranov's declaration establishes that Claims 1-7, 10, 13, and 14 cannot proceed *as a matter of law* under Russian law. Lynwood's own expert, Christophoroff, fails to rebut Muranov's conclusion that four tort claims are not recognized under Russian law. Even if California law applies, Lynwood still fails to state a claim against the Individuals.

Konovalov, Sysoev, Alexeev, and Dounin (the "Foreign Individuals") are not subject to jurisdiction in this Court for a dispute that arose prior to 2011 in Russia. Lynwood does not establish jurisdiction over each individual, and forcing them to defend themselves in the United States presents an insurmountable burden. As Lynwood itself has noted (*see* Dkt. 24), Russia no longer cooperates with the United States under the Hague Convention. The Foreign Individuals would thus be deprived of the central evidence to this case—documents and testimony from current and former Rambler employees confirming that Sysoev developed NGINX independently.

I. LYNWOOD'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Lynwood's claims arise from NGINX software developed by Sysoev in Russia beginning nearly *twenty years ago* and the purported theft of that software *nine years ago*. Lynwood alleges that Sysoev and Konovalov notified Rambler of their intent "to form a new company that would provide support services" for NGINX in 2011. *See* Compl. ¶ 281. Lynwood admits that it had constructive knowledge of its claims in January 2015:

> In January 2015, . . . Rambler and Lynwood prophylactically entered into the Assignment Agreement . . . which assigned Rambler's employment and intellectual property rights to Lynwood for enforcement *in the event Sysoev or Konovalov would ever claim an*

> *ownership right to the NGINX software or had previously engaged in any illicit or wrongful conduct vis-à-vis their employment obligations or Russian law*.

Id. ¶ 471 (emphasis added). By the time Lynwood and Rambler entered into the January 2015 Agreement, in direct response to Sysoev's public statements, both were on notice of the claims in this lawsuit. No doctrine allows a litigant to lie in wait for five years with knowledge of its claims.[1]

A. The Last Overt Act Doctrine Does Not Save Lynwood's Claims

The last overt act doctrine only applies "when a civil conspiracy is properly alleged and proved." *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 786 (1979). "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994). Lynwood improperly pleads civil conspiracy as a cause of action. It also does not specify which subsequent causes of action give rise to conspiracy liability or which actors are conspirators. *See* Compl. ¶¶ 524-53. These pleading deficiencies render the last overt act doctrine inapplicable.

Even assuming otherwise, the underlying alleged tort was completed no later than 2011 when Sysoev and Konovalov left Rambler. *See* Compl. ¶ 281. Conspiracy cannot be alleged against any of the other Individuals for participating in later events. *See* Mot. at 9:11-28. As Lynwood's authorities acknowledge, it must identify "the substantive offense which is the primary object of the conspiracy." *Livett v. F. C. Fin. Assocs.*, 124 Cal. App. 3d 413, 419 (1981). "Once this offense has been completed, the statute of limitations on the conspiracy commences running, and subsequent conduct related to the conspiracy, such as flight or concealment, does not constitute 'overt acts.'" *Id.* The last overt act of the alleged conspiracy was completed no later than 2011. The subsequent 2019 sale of the NGINX business to F5 is not tortious conduct that can support a conspiracy claim. *See In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1213 (N.D. Cal. 2015) (Koh, J.) ("Plaintiffs have failed to sufficiently allege that Defendants took any overt

[1] Contrary to Lynwood's suggestion, the California and Russian limitations periods are not the same. *See* Mot. Appendix A1-A4; Muranov Decl. ¶¶ 90, 94, 104. The Individuals establish that all claims asserted are time-barred regardless of which limitations period applies. *See* Mot. 4-8.

act that would restart the statute of limitations").[2]

Wyatt does not apply. *Wyatt* concerned a mortgage company defrauding its borrowers, and the "continuing wrong" doctrine tolled the statute of limitations only "for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place." *Wyatt*, 24 Cal. 3d at 788. Lynwood was not "held in place" by "sheer economic duress or undue influence." It was on notice of potential "illicit or wrongful conduct" by January 2015 and delayed pursuit of its claims until June 2020. Its claims are thus untimely. *See De La Torre v. Icenhower*, No. 09CV1161 BTM (BLM), 2010 WL 11508658 at *2 (S.D. Cal. Feb. 2, 2010) ("[A]fter the fraud is discovered, statute tolled only if the 'sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place.'") (quoting *Wyatt*, 24 Cal. 3d at 788).[3]

B. Fraudulent Concealment Allegations Do Not Save Lynwood's Claims

Fraudulent concealment requires that the plaintiff "did not have 'actual or constructive knowledge of the facts giving rise to its claim'" and that it "acted diligently in trying to uncover the facts giving rise to [its] claims." *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d at 1204 (quoting *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012)). Contrary to any claims of concealment, Lynwood alleges that Sysoev was paid "bonuses and outsized raises" (Compl. ¶ 191) for his work on NGINX. Lynwood has also pleaded knowledge of Sysoev's public statements in January 2015, which Lynwood admits put it on notice of supposedly illegal conduct by Sysoev and Konovalov. *See* Compl. ¶ 471. Lynwood's actual, or at least constructive, knowledge of its claims by January 2015 renders fraudulent concealment inapplicable. *See Yetter*, 428 F. Supp. 3d at 222-23

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[2] Lynwood's other authorities do not change the analysis. In *Utah v. McKesson*, the concealment occurred at the same time as the tortious conduct, not afterward. *See* 2011 WL 2884922 at *7 (N.D. Cal. July 19, 2011). In *Raceway Properties*, there was no alleged concealment after the completion of the conspiracy. *See* 157 F. App'x 959 (9th Cir. 2005) (unpublished and not precedential under Ninth Circuit Rule 36-3).

[3] Lynwood's other citations regarding the "continuing violation" doctrine, (*see* Opp. at 5:13-24), do not support tolling. *Reiser* concerned allegations that were not independently actionable but had cumulative actionable effect. *See* 2018 WL 2762024 at *4. *Reiser* applied *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185 (2013), which confirms that the doctrine does not apply when "[t]he complaint identifies a series of discrete, independently actionable alleged wrongs." *Id.* at 1198. Lynwood alleges that various actions by the Individuals were fraudulent and actionable. *Sacramento E.D.M.* simply affirmed with no analysis of the continuing violation doctrine.

("[T]olling ceases when those facts are, or should have been, discovered by the plaintiff.") (quoting *Credit Suisse Secs. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012)).[4]

C. The Delayed Discovery Rule Does Not Save Lynwood's Claims

The delayed discovery rule requires the specific pleading of facts that show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. *E-Fab, Inc. v. Accountants, Inc. Servs.*, 153 Cal. App. 4th 1308, 1319 (2007). "The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand a motion to dismiss." *Plumlee v. Pfizer, Inc.*, No. 13-CV-00414-LHK, 2014 WL 695024 at *8 (N.D. Cal. Feb. 21, 2014) (Koh, J.). The doctrine cannot delay accrual, as Lynwood affirmatively pleads notice of its alleged claims—or at the least, knowledge that illegal activity may have occurred—no later than January 2015. *See Utterkar*, 2014 WL 5019921 at *6 ("If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further.") (Koh, J.). Facially deficient invocations of the discovery rule should be dismissed. *See, e.g.*, *Plumlee*, 2014 WL 695024 at *8; *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 138 (N.D. Cal. 2020) (Koh, J.).[5]

II. THE CLAIMS AGAINST THE INDIVIDUALS ARE DEFICIENT

A. Mr. Muranov Is Fully Qualified to Provide Guidance on Russian Law

Mr. Muranov is well qualified to opine on the aspects of Russian law at issue. He has served as an arbitrator in more than 60 international arbitration cases and prepared 30 expert reports on issues regarding Russian law and international regulations. Dkt. 106-7 at 31-32. Lynwood's four "discrediting" cases do no such thing. There is no finding that Muranov was not qualified to opine on Russian law and no finding that his opinions were unreasonable or not well-founded. In at least one of Lynwood's opinions, the three-arbitrator panel *adopted* Muranov's opinion and concluded "there did not seem to be a significant difference between the experts." *SEA Metropolitan v. DGM Commodities*, 2013 WL 1816153 at ¶¶ 110, 133. Read *most* critically

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[4] Short-form citations are used herein for cases cited in the Individuals' Motion, Dkt. 106, with complete citations in the Table of Authorities.

[5] In the unpublished and non-citeable *H.B. Filmes* decision, a document created a factual dispute. Here, Lynwood admits the facts proving its actual or constructive knowledge.

toward Muranov, the other triers of fact Lynwood relies on simply decided an issue against him. That hardly discredits an expert who provided expert services in nearly one hundred proceedings.[6]

Lynwood's expert fails to address or rebut Muranov's opinion that Claims 1, 7, 10, 13, and 14 are not cognizable under Russian law. Lynwood objects that the Court was not provided with translations of the thirty-six cited authorities, but the Ninth Circuit has held that the Rule 44.1 determination of foreign law is intended a flexible and informal process and that such material and testimony may be considered "at any time, whether or not submitted by a party." *DeFontbrune v. Wofsy*, 838 F.3d 992, 997-98 (9th Cir. 2016). The Individuals provided Muranov's initial and reply declarations (filed concurrently herewith), which contain extracts of the authorities on which he relies, and are prepared to provide any translated authorities that the Court would like to review—as Muranov expressly offered in his initial declaration.[7]

B. The Labor and Employment Claims (Claims 2-6) Fail Under Russian Law

Lynwood concedes that Claims 2 through 6 are governed by Russian law. *See* Opp. at 9. These claims must be dismissed because: (1) claims 2 through 4 are for breach of labor contracts and are not assignable from the employer (Rambler) to a third party (Lynwood); and (2) Lynwood has not properly alleged that Konovalov, Sysoev, and Smirnoff owed to Rambler the requisite fiduciary duties for Claims 5 and 6. *See* Muranov Decl. ¶¶ 20-51.

C. The Tort Claims (Claims 1, 7, 10, 13 and 14) Fail Under Russian or California Law

Russian law should also apply to Claims 1, 7, 10, 13, and 14 because Russia has a greater interest in the application of its law to these claims. As Muranov opines—and Christophoroff fails to rebut—Russian law does not recognize *any* of the asserted tort claims.

1. The Court Should Not Apply California Law By Default

The Court need not conduct a formal choice of law analysis. The claims should be

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6 In *Yukos Capital v. OAO Samaraneftegaz*, the court took issue with the *party's* arguments, not Muranov's opinion. 2014 WL 81563 at *5 (S.D.N.Y. Jan. 9, 2014). That district court opinion was vacated because it failed to support its conclusions. The final opinion merely concluded that the tribunal found the other expert's analysis more persuasive. Dkt. 125-03 at ¶ 25.

7 In *Apple v. Samsung Elecs. Co.*, 2012 WL 1672493 (N.D. Cal. May 14, 2012) (Koh, J.), the experts did not attach translations, but instead (as Muranov did) included translated extracts of foreign authorities within their declarations. *See Apple* Dkt. Nos. 405-4 & 522.

dismissed under both California and Russian law. Lynwood is not entitled to the application of California law because the Individuals' opening brief did not include a choice-of-law analysis.

There is no requirement that foreign law issues be decided at the pleadings stage. *See, e.g.*, *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001) ("[N]otice of issues of foreign law that reasonably would be expected to be part of the proceedings should be provided in the pretrial conference."). Lynwood agrees; it argues that "it is premature to conduct a detailed choice-of-law analysis [on limitations] at this stage of the litigation." Opp. at 4 n.4. To avoid default application of forum law, the Individuals were only required to identify the differences between California and Russian law—as they did in the motion, the Muranov declaration, and a detailed Appendix A. *See* Mot. 8-9, Muranov Decl. ¶¶ 17-18, 52-66, 67-69, 70-89; *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 919 (2001) ("[T]he foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California"). Lynwood cites no authority prohibiting further governmental interest analysis in a reply; its primary citation dealt with the submission of improper reply evidence in a situation unrelated to choice-of-law analysis. *See Rivera v. Saul Chevrolet, Inc.*, No. 16-CV-05966-LHK, 2017 WL 3267540 at *6 (N.D. Cal. July 31, 2017). The Individuals properly identified the differences between California and Russian law and argued that all claims are properly dismissed regardless of which law the Court applies.

2. Russian Law Properly Applies To Claims 1, 7, 10, 13, and 14

Should a formal choice-of-law analysis be required, Russian law applies to Claims 1, 7, 10, 13, and 14. "In a federal question action where the federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state." *Paracor Fin., Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). California uses the "governmental interest" approach. *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 87–88 (2010).

Conspiracy (Claim 1): The majority of the conspiracy allegations concern events in Russia. *E.g.*, Compl. ¶ 533 ("Konovalov fraudulently represented to Rambler"); *id.* ¶ 535 ("The Team concealed their activity by . . . fraudulently misrepresenting to Rambler"). The purported result of the conspiracy, the sale years later to F5, does not bring the conspiracy under California

law. F5 is a *Washington* company. Russia, which does not acknowledge claims for civil conspiracy, has a stronger interest in the application of its law. *McCann*, 48 Cal. 4th at 87–88.

Aiding and Abetting (Claim 7): Lynwood admits that Claims 5 and 6 for alleged breaches of Article 53.3 of the Russian Civil Code are governed by Russian law, yet it claims that Count 7 for alleged aiding and abetting of those breaches by Alexeev and Dounin are governed by California law. For aiding and abetting, "[a] plaintiff's object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong." *Howard v. Superior Court*, 2 Cal. App. 4th 745, 749 (1992). Alexeev and Dounin were based in Russia during the relevant period. Lynwood fails to explain how Russian law governs the underlying breach of Article 53.3 that took place in Russia, but that California law would apply to the derivative tort that is also based on Russian actions and actors.

Tortious Interference with Contract (Claim 10): Lynwood alleges that Konovalov and Robertson interfered with Sysoev's contractual obligations to Rambler, which it concedes are governed by Russian law. In *Abogados v. AT&T, Inc.*, 223 F.3d 932 (9th Cir. 2000), the court considered whether New York or Mexico law should apply, where New York recognized an action for tortious inference with contract and Mexico did not. The Ninth Circuit found that Mexico's interest was significant and that "[i]t is nonsensical to suggest that Mexico has no interest in regulating conduct that affects contracts made in Mexico." *Id.* at 935. In this case, any "interference" would affect contracts made in Russia and is properly governed by Russian law.

Tortious Interference with Prospective Business Advantage (Claim 13): This claim alleges no connection to California on its face, and incorporates various other claims in a scattershot manner. *See* Compl. ¶ 668. For the reasons stated above, Russia has a stronger interest in the application of its law to these claims.

Fraud (Claim 14): While Claim 14 contains references to the headquartering of NGINX Software, Inc. in San Francisco, Compl. ¶¶ 677-680, nothing regarding those acts is alleged to be fraudulent. The alleged destruction of Rambler servers has no connection to California. *See* Compl. ¶ 681. The Complaint contains no allegations of material misstatements or actionable omissions occurring in California that could bring Claim 14 within the scope of California's

interests. Russian law properly applies to this claim.

Given Christophoroff's implicit admission that none of the tort claims can proceed under Russian law, all should be dismissed without leave to amend.[8]

D. The IP Claims (Claims 15-17, 24-25) Fail Against the Individuals

Lynwood makes a half-hearted effort to defend its copyright and trademark claims as pleaded against the Individuals. On the copyright claims, Lynwood cites to general legal principles and then relies on a blanket cite to more than 115 paragraphs of the Complaint. None identify any specific acts of copyright infringement by the Individuals within the three-year limitations period or any facts justifying personal liability or vicarious liability on their part. They do not mention Robertson at all and only mention Dounin and Smirnoff when referring to events years ago and defining the "Team" and the "Disloyal Employees." Lynwood takes the opposite approach on the trademark claims: it does not cite a single paragraph of the Complaint and summarily states that the Individuals' actions are wrongful—without offering any facts to show how any of the six Individuals would be personally liable. Both arguments fail to show any basis in the pleading for assessing the viability of Lynwood's claims against each of the six Individuals.

III. THE FOREIGN INDIVIDUALS ARE NOT SUBJECT TO JURISDICTION

Lynwood does not assert general personal jurisdiction. Because Lynwood bears the burden of establishing jurisdiction, *see Love*, 611 F.3d at 608, general jurisdiction is foreclosed.

A. Lynwood Does Not Establish Specific Jurisdiction Over Its Claims

Lynwood's burden of establishing the basis for jurisdiction, *see Love*, 611 F.3d at 608; Opp. at 18:28-19:1, includes establishing jurisdiction over each defendant separately, *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003), by submitting "evidence supporting personal jurisdiction over each defendant without grouping them together." *Head v. Las Vegas Sands, Ltd. Liab. Corp.*, 760 F. App'x 281, 284 (5th Cir. 2019).

Lynwood refers to Sysoev, Konovalov, Alexeev, and Dounin collectively as the "RDs" and impermissibly aggregates their conduct, *see* Opp. at 20:1-12, 21:22-22:18, overstating each

[8] The claims also fail under California law for the reasons discussed in greater detail in the other defendants' motions to dismiss and in the Individuals' opening memorandum of law.

defendant's contacts with California. For example, it incorrectly asserts that the "RDs" marketed NGINX in California, Opp. at 20:3-4, but Dounin was not involved in any marketing. *See* Dkt. 106-4 ¶ 9. Lynwood alleges that the "RDs" organized various corporations and sold them to F5 in San Francisco, *see* Opp. at 20:9-11, but only Konovalov traveled to San Francisco for the sale. *See* Dkt. 106-2 ¶ 16; Dkt. 106-3 ¶ 11; Dkt. 106-4 ¶ 14; Dkt. 106-5 ¶ 14. Lynwood also suggests that the Court should exercise jurisdiction based on the number of times that "RDs . . . collectively traveled to California." *See* Opp. at 22:8-9. Such summary analysis is improper. *See Harris Rutsky*, 328 F.3d at 1130; *see also Head*, 760 F. App'x at 284; *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 904 (6th Cir. 2006). Because Lynwood does not identify jurisdictional facts specific to each Foreign Individual, the claims against them should be dismissed. *See Medimpact Healthcare Sys., Inc. v. IQVIA Holdings Inc.*, No. 19CV1865-GPC(LL), 2020 WL 1433327 at *5 (S.D. Cal. Mar. 24, 2020) (dismissing two defendants because plaintiff improperly "lumped defendants together" and did not "specifically isolate the jurisdictional facts amongst the different . . . entities"); *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 849 (N.D. Cal. 2018); *Parnell Pharm., Inc. v. Parnell, Inc.*, No. 5:14-CV-03158-EJD, 2015 WL 5728396 at *4 (N.D. Cal. Sept. 30, 2015).

Lynwood also must establish jurisdiction over each claim. *See Action Embroidery*, 368 F.3d at 1180. Lynwood fails to address how each defendant's contacts give rise to jurisdiction over its claims. *NetApp, Inc. v. Nimble Storage, Inc.*, in which this Court applied the doctrine of pendent personal jurisdiction, *see* 41 F. Supp. 3d 816, 827 (N.D. Cal. 2014), does not absolve it of that burden. The doctrine only applies in certain circumstances and its application (which Lynwood does not request) is ultimately discretionary. *See Action Embroidery*, 368 F.3d at 1181.

B. Lynwood Does Not Otherwise Establish Personal Jurisdiction

Lynwood must establish that (1) each of the defendants purposefully availed himself of, or directed activity to, California, and (2) the claims arise from his forum-related activities. *See CollegeSource*, 653 F.3d at 1076; *see also* Opp. at 18:21-19:1.

1. Lynwood's Claims Do Not Arise from Forum Activities

With respect to the latter prong, the claims must arise out of the defendant's forum-related activities. *Schwarzenegger*, 374 F.3d at 802. Lynwood argues that the court must determine if the

plaintiff would not have been injured "but for" the defendant's California conduct, *see* Opp. at 22; *Panavision*, 141 F.3d at 1322, but Lynwood would still have been injured "but for" the Foreign Individuals' contacts with California. Even if the Foreign Individuals had no contacts with California, they still allegedly developed and misappropriated NGINX while working in Russia for a Russian company. *See* Compl. ¶¶ 12-30. Lynwood cannot meet its burden to establish "but for" causation as concerning the forum state.

2. Lynwood Does Not Establish Purposeful Availment for Contracts

Turning to the first prong, the analysis differs for contract and tort claims. *Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015).

Claims 2 and 3 assert contract-based claims against Konovalov and Sysoev. *See* Compl. ¶¶ 554-75. Claims sounding in contract require a plaintiff to prove that each defendant purposefully availed himself of the forum. *Picot*, 780 F.3d at 1212. To determine purposeful availment, the Court should evaluate—among other factors—the terms of the contracts, the parties' actual course of dealing, their prior negotiations, and any contemplated future consequences. *See HK China Grp.*, 417 F. App'x at 666. The forum contacts to be evaluated are those that existed at the time the cause of action arose. *Strasner*, 5 Cal. App. 5th at 226. As explained in the Individuals' opening brief, neither Sysoev nor Konovalov had sufficient contacts with California at the time the breach-of-contract claims first arose in 2011, when they supposedly breached their employment obligations. *See* Opening Br. 16:6-24.

Lynwood does not identify any significant purposeful availment. Its authorities recognize the location of contract performance as "the most important factor for determining jurisdiction." *See Berdux v. Project Time & Cost, Inc.*, 669 F. Supp. 2d 1094, 1100-01 (N.D. Cal. 2009); Opp. at 22 n.12. The relevant Russian employment contracts were not expected to be performed in California. The California contacts discussed by Lynwood are mostly irrelevant—some because they occurred after 2011, others because they involve defendants other than Sysoev or Konovalov. *See* Opp. at 21:23-22:18. Lynwood's citation to *Sinatra* is inapposite. *Sinatra* considered jurisdiction over a tort claim, relied in part on the *Calder* effects test applicable to tort claims, and premised jurisdiction on its conclusion that "the center of [the plaintiff's] business is in California."

See Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1192, 1197 (9th Cir. 1988). Neither Lynwood nor Rambler has identified any business operations by them in California. Lynwood has not met its burden of establishing purposeful availment by Sysoev or Konovalov.

3. Lynwood Does Not Establish *Calder* Purposeful Direction for Tort

For claims sounding in tort, Lynwood must satisfy the *Calder* effects test, which requires it to establish that each defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food*, 303 F.3d at 1111. The test applies "whether or not the actions themselves occurred within the forum."[9] *Yahoo!*, 433 F.3d at 1206; *accord Mavrix*, 647 F.3d at 1228.

Although the relevant considerations for acts aimed at the forum have recently been expanded, *see Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1070 (9th Cir. 2017), the Foreign Individuals' individual contacts with California are insufficient to establish jurisdiction. Sysoev and Konovalov sought financing from a variety of international investors, Dkt. 106-3 ¶ 6, and eventually obtained financing from the entities identified in the complaint after meeting in Moscow. Dkt. 106-2 ¶ 9. At the time, Konovalov understood Greycroft to be based in New York, e.ventures to be an international fund, and Runa to have offices in Moscow. Dkt. 106-3 ¶ 6. Three NGINX entities were eventually formed, only one of which was organized under Delaware law and initially headquartered in California, *see, e.g.*, Dkt. 106-2 ¶ 10, with the California office maintained at the investors' request. *Id*. That one of the NGINX entities maintained a principal place of business in California cannot be imputed to corporate employees as a jurisdictional contact. *See Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1109 (9th Cir. 2020). The Foreign Individuals were employed in Russia by NGINX Ltd., which is not named as a defendant. *See* Dkt. 106-2 ¶ 6; Dkt. 106-3 ¶ 5; Dkt. 106-4 ¶ 4; Dkt. 106-5 ¶ 6. While all four defendants acknowledge traveling to California at various times over the

[9] Lynwood argues that jurisdiction is proper when an intentional tort occurs in forum. Opp. at 19:23-25. *Freestream v. AeroLaw Group*, however, acknowledges contrary language in prior Ninth Circuit opinions—including the *en banc Yahoo!* decision cited above. 905 F.3d 597, 605-06 (9th Cir. 2018). *Freestream* cannot overturn prior published authority. *See Lambert v. Saul*, 980 F.3d 1266, 1274 (9th Cir. 2020).

course of a decade, most of the travel was sporadic; for example, Dounin recalls traveling to California only twice. Dkt. 106-4 ¶ 13. Business development opportunities were pursued globally, with a substantial portion of NGINX customers located in Eastern Europe, Latin America, and China. Dkt. 106-5 ¶ 8. Konovalov was the only individual who traveled to San Francisco in connection with the F5 sale. *See* Dkt. 106-2 ¶ 16; Dkt. 106-3 ¶ 11; Dkt. 106-4 ¶ 14; Dkt. 106-5 ¶ 14. Lynwood has not shown a continuous attempt to exploit the California market.

None of the documents cited by Lynwood reflect such an attempt. The June 6, 2010 email, which is not attached to the opposition, refers to realizing NGINX's full potential "in the US market." *See* Opp. at 20:23-25. It does not reflect NGINX's eventual corporate structure, which consisted of three separate entities organized in three different countries. *See* Dkt. 106-3 ¶ 8. The translations of Konovalov's blog posts, *see* Dkt. 125-1, Ex. 1, do not indicate that the defendants were continually exploiting the California market, and the NGINX pitch materials cited by Lynwood do not reflect a "Silicon Valley exit strategy." *See* Opp. at 20:25-26. The materials, which Lynwood incorporated into the pleadings by reference, identify potential exit sales to more than a dozen different companies headquartered in California, Washington (F5, Parallels), New Jersey (Radware), Israel (Radware), Florida (Citrix), New York (IBM), Texas (AT&T), Colorado (Level 3), Pennsylvania (Comcast), and Massachusetts (Akami). *See* Dkt. 106-6, Ex. 1 at 20. Lynwood has not shown any intentional acts expressly aimed at California.

Lynwood also has not established the third prong of the *Calder* test. The intentional acts aimed at California must cause "harm that the defendant knows is likely to be suffered in the forum state." *Dole Food*, 303 F.3d at 1111. Courts rely "in significant part" on a corporation's principal place of business to determine where harm occurs. *See id.* at 1113–14. Neither Lynwood nor Rambler is located in California. Harm can be suffered in other jurisdictions, such as the forum where the alleged "bad acts" occurred. Lynwood's authorities, however, are premised on findings that the plaintiff maintained business operations in the forum state that would be harmed. In *Mavrix*, the plaintiff's "primary business" consisted of selling photographs to celebrity news publications and it worked with celebrities in California, maintained a California office, employed California-based photographers, registered an agent for service of process in California, and paid

fees to the California Franchise Tax Board. *See Mavrix*, 647 F.3d at 1221-22. The court therefore concluded that Mavrix would foreseeably suffer harm in California. *Id.* at 1231-32. In *AirWair v. Schultz*, this Court recognized that if a plaintiff uses its trademark in a state, and the defendant infringes that trademark in the same state, injury would felt mainly in that state. 73 F. Supp. 3d 1235, 1237 (N.D. Cal. 2014). Neither Lynwood nor Rambler has used the NGINX trademarks in California. Lynwood cannot establish any foreseeable harm suffered in California.

C. The Exercise of Jurisdiction Would Not Be Reasonable

Even assuming that Lynwood met its burden of establishing jurisdiction, the exercise of jurisdiction would not be reasonable under the applicable seven-factor test.

First, even if Lynwood met its burden of establishing purposeful availment for *each* defendant, the low degree of purposeful injection weighs against jurisdiction. *Dole Food*, 303 F.3d at 1114-15 (level of purposeful injection could support a finding of purposeful availment, "yet still weigh[] against the reasonableness of jurisdiction"). The Foreign Individuals worked in Russia; Sysoev developed NGINX in Russia; he obtained investments for an NGINX company from Moscow; only one of the three NGINX entities was organized in the U.S.; that entity initially maintained only a "virtual office" in San Francisco at the behest of investors; all four Foreign Individuals were employed by a Russian entity and were based in Russia; NGINX's customer base was global; and NGINX was eventually sold to a non-California company.

Second, the burden on the Foreign Individuals is of "primary concern" and the Court must "consider practical problems resulting from litigating in the forum." *See Bristol-Myers Squibb*, 137 S. Ct. at 1780. Costs, travel, and lack of familiarity with the American legal system impose high burdens on international defendants. *See Asahi Metal*, 480 U.S. at 114. Each of the Foreign Individuals affirms that his native language is not English and they would all require translators to participate effectively in formal legal proceedings. *See* Dkt. 106-2 ¶ 17; Dkt. 106-3 ¶ 13; Dkt. 106-4 ¶ 15; Dkt. 106-5 ¶ 16. Most importantly, discovery in this matter is expected to entail extensive document collection from and depositions of Russian witnesses. The core dispute in this matter—ownership of NGINX—will be decided exclusively based on evidence located in Russia. All of the documents will require translation, a significant expense and a time-consuming

process.[10] The Foreign Individuals cannot "present evidence on the extent of this burden," given that they have not yet incurred the costs. Ultimately, despite advancements in technology, the Ninth Circuit recognizes that this factor militates against jurisdiction—especially when discovery would be centered abroad. *See, e.g.*, *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981). Even the cases cited by Lynwood found that this factor favored the defendant. *See CollegeSource*, 653 F.3d at 1080; *Ballard v. Savage*, 65 F.3d 1495, 1501 (9th Cir. 1995).[11]

Third, the potential for conflicts with Russia's sovereignty weighs against jurisdiction. The inclusion of international defendants is a factor, *see Ins. Co. of N. Am.*, 649 F.2d at 1272, as Lynwood's authorities confirm. *See AirWair*, 73 F. Supp. 3d at 1240. The claims that will determine the key issue of ownership—those concerning Sysoev's and Konovalov's alleged obligations to Rambler and copyright ownership—are expressly pleaded under Russian law. *See* Compl. ¶¶ 587-97, 690-95. These Russian claims, and the need for the application of Russian law, weigh against jurisdiction. *See AirWair*, 73 F. Supp. 3d at 1240.

Fourth, the Supreme Court instructs that the forum state's interest in adjudicating a dispute is "considerably diminished" when the plaintiff is not a forum resident. *See Asahi Metal*, 480 U.S. at 114. Lynwood does not provide any controlling authority to the contrary, and this Court's *AirWair* decision is not to the contrary. *AirWair* concluded that a non-resident plaintiff established harm in California because it used the trademark at issue in California and that California therefore had an interest in redressing the alleged injuries. *See AirWair*, 73 F. Supp. 3d at 1238, 1240. Neither Lynwood nor Rambler used the NGINX trademarks in California or conducted business in California. There is no harm for California to remedy and no corresponding interest in the suit.

Fifth, the location of the evidence and witnesses are a critical concern. "The site where the injury occurred and where evidence is located usually will be the most efficient forum." *Pac. Atl. Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1331 (9th Cir. 1985). This dispute is over the ownership of NGINX. The documents and witnesses proving that Rambler was not involved in

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[10] Lynwood itself has previously acknowledged similar concerns to the Court, citing the "need for interpreters in many of the depositions." See Dkt. 119 at 24:7-9.

[11] *CollegeSource* involved a Philadelphia defendant. *See* 653 F.3d at 1080.

the development of NGINX are located almost exclusively in Russia. As Lynwood has previously explained to the Court, however, Russia does not cooperate with U.S. requests under the Hague Convention. Dkt. 35 at 8-15. Exercising jurisdiction over Sysoev and the other Foreign Individuals would leave them unable to guarantee the testimony of key witnesses in their defense. Lynwood does not address this issue, which has not been remedied by "modern advances in communication or transportation." *See* Opp. at 24:3-7. Combined with the other issues identified in the Individuals' opening brief, this factor weighs heavily against jurisdiction.

Sixth, as noted in prior briefing, Lynwood's convenience "is not of paramount importance." *See Dole Food*, 303 F.3d at 1116.

Seventh, Lynwood bears the burden of proving that an alternate forum is unavailable. Lynwood declined to address this factor. There is no dispute that Lynwood could pursue its claims against the Foreign Individuals in Russia if it had any valid such claims.

D. Jurisdictional Discovery Should Not Be Permitted

Jurisdictional discovery is only warranted if significant jurisdictional facts are controverted or if a more satisfactory showing of facts is necessary. *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). No significant facts are controverted, and Lynwood has not identified any specific information that additional discovery would produce. Jurisdiction would not be reasonable regardless of whether the Foreign Individuals purposefully availed themselves of or directed activities to California. Discovery therefore need not be permitted.

IV. CONCLUSION

The Individual Defendants respectfully request that the Court dismiss Lynwood's claims against them without leave to amend. Further, Lynwood's request to strike should be denied. [12]

Dated: January 11, 2021

Respectfully submitted,

KING & SPALDING LLP

By: /s/ *Quyen Ta*
QUYEN L. TA (SBN #229956)

[12] The Individuals provided Appendix A for the Court's convenience, similar to the three-page glossary that Lynwood supplied. Dkt. 126 at vi-vii. Appendix A merely summarizes which claims are asserted against which Individuals and the defenses relevant to each claim.